SEP 25 1922
WM. R. STANSBURY
CLERK

No. [redacted]74

Supreme Court of the United States

OCTOBER TERM, 1922

No.

THE SALEM TRUST COMPANY,
PETITIONER

v.

MANUFACTURERS' FINANCE COMPANY ET AL.,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROBERT G. DODGE,
LAURENCE CURTIS 2d,
Counsel

PRESS OF GEO. H. ELLIS CO. (INC.) BOSTON

Supreme Court of the United States

OCTOBER TERM, 1922

[ ]

THE SALEM TRUST COMPANY, PETITIONER

v.

MANUFACTURERS' FINANCE COMPANY ET AL., RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

The Nelson Blower & Furnace Company, a Massachusetts corporation, first assigned certain accounts receivable to the petitioner, The Salem Trust Company, also a Massachusetts corporation, and later assigned the same accounts to the respondent, the Manufacturers' Finance Company, a Delaware corporation, a purchaser in good faith and for value without knowledge of the earlier assignment. The respondent first gave notice of the assignment to the debtor. The Nelson Blower & Furnace Company becoming financially embarrassed, a dispute arose between the petitioner and respondent as to whose assignment should prevail. By mutual agreement the assigned accounts were collected and placed in the hands

of the International Trust Company pending settlement of the dispute. Petitioner sued respondent and the International Trust Company in the Massachusetts Court. At the motion of respondent the suit was removed to the United States District Court for the District of Massachusetts on the ground that the International Trust Company was a nominal party only, and on the ground of the diversity of citizenship between petitioner and respondent. The District Court held that the respondent (the subsequent assignee who first gave notice) should have priority. That decision was affirmed by the Circuit Court of Appeals for the First Circuit, Judge Brown dissenting, 280 Fed. 803 (1922), and the case is here on petition for *certiorari*.

ARGUMENT.

It is submitted that no such issues are here involved as should justify an appeal to this extraordinary jurisdiction.

Two questions are presented,—the question of removal, and the question as to who should prevail as between a subsequent assignee first giving notice (the respondent) and a prior assignee.

As to removal, without reviewing in detail the reasons which have impelled three courts to judge it proper, it may be suggested that no such fundamental question is in issue as would warrant this court in intervening on *certiorari*.

As to the question who should prevail as between a subsequent assignee first giving notice (the respondent) and a prior assignee, this of course is the question decided in the celebrated English case of *Dearle* v. *Hall*, 3 Russ. 1 (1828), in favor of the subsequent assignee first giving notice.

THE DOCTRINE OF *DEARLE* V. *HALL* IS (TO USE THE WORDS OF THE CIRCUIT COURT OF APPEALS IN THE PRESENT CASE) "THE WELL-ESTABLISHED RULE OF THE FEDERAL COURTS."

In *Judson* v. *Corcoran*, 17 How. (U. S.) 612 (1854), the subsequent assignee first giving notice was preferred to the prior assignee, the court at page 615 referring specifically to *Dearle* v. *Hall*.

In *Spain* v. *Hamilton's Administrator*, 1 Wall. (U. S.) 604 (1863), the court said at page 623: "This case has been examined by us very fully. . . . We think it to be clearly within the principles decided by this court in *Judson* v. *Corcoran*. It is clearly within the cases which

have been so fully and ably reported of *Dearle* v. *Hall* and *Loveridge* v. *Cooper*."

In *Methven* v. *Staten Island, etc., Co.*, 66 Fed. 113 (C. C. A. 2d Circ.) (1895), the court said at page 115: "As we understand the judgments of the Supreme Court of the United States in *Judson* v. *Corcoran* . . . and *Spain* v. *Hamilton's Administrator* . . . they approve the doctrine of *Dearle* v. *Hall* and *Loveridge* v. *Cooper*."

The Elmbank, 72 Fed. 610 (D. C. Cal.) (1896).

Third National Bank v. *Atlantic City*, 126 Fed. 413 (C. C. N. J.) (1903).

In re Leterman, Becher & Co., 260 Fed. 543 (C. C. A. 2d Circ.) (1919).

See *Farmers & Merchants Bank* v. *Farwell*, 58 Fed. 633, 637 (C. C. A. 8th Circ.) (1893).

In re Hawley, etc., Co., 233 Fed. 451, 453 (D. C. Penn.) (1916).

That the doctrine of *Dearle* v. *Hall* is the rule of the Federal Courts has been universally assumed and stated by other courts and by text-writers. See, for example:—

Fortunato v. *Patten*, 147 N. Y. 277, 283.

Graham Paper Co. v. *Pembroke*, 124 Cal. 117, 120, 121.

Lambert v. *Morgan*, 110 Md. 1, 26, 27.

Enochs-Haris Lumber Co. v. *Newcomb*, 79 Miss. 462, 467.

Jenkinson v. *New York Finance Co.*, 79 N. J. Eq. 247, 260.

Jack v. *National Bank of Wichita*, 17 Okla. 430, 435.

Coffman v. *Liggett*, 107 Va. 418, 422.

Pomeroy, Eq. Juris., 4th Ed. § 695, Note J.

66 L. R. A. 761.

5 Corp. Jur. 953.

19 Yale Law Journal, 258, 263.

60 Univ. of Penna. Law Rev. 668, 669.

The case in the Sixth Circuit, *Petition of the National Discount Co.*, 272 Fed. 570 (1921), referred to on page 14 of petitioner's brief, is not in point, as there the question was not between a prior and a subsequent assignee, but between a prior assignee and a subsequent trustee in bankruptcy. There is a well-recognized difference between these cases as pointed out by Professor Scott, who says:—

> "An assignee of an equitable interest or chose in action, according to the weight of authority even in jurisdictions which follow *Dearle* v. *Hall*, is preferred to a subsequent attaching or garnishing creditor, although the assignee has not given to the obligor notice of the assignment. *Third Nat. Bk.* v. *Atlantic City*, 126 Fed. 413; *Steltzer* v. *Condon*, 139 Iowa, 754; *Phillip's Est.*, 205 Pa. 525; Ames, 413; Pomeroy, Eq. Juris. § 694; Dec. Dig., Assignments, 86; 5 Corp. Jur. 972." (Scott, "Cases on Trusts," page 623.)

The case of *Grecy* v. *Dockendorff*, 231 U. S. 513 (1913), referred to on page 19 of petitioner's brief, is likewise not in point for the same reason. Indeed Mr. Justice Holmes stressed the distinction, saying, "Notice to the debtor was not necessary to the validity of the assignment *as against creditors*." (Italics ours.)

BUT IT IS CONTENDED BY THE PETITIONER THAT THE FEDERAL COURT SHOULD HERE APPLY THE MASSACHUSETTS RULE, WHICH IS ALLEGED TO BE DIFFERENT. HOWEVER, IT IS FUNDAMENTAL THAT ON QUESTIONS OF GENERAL COMMERCIAL LAW OR OF GENERAL JURISPRUDENCE A FEDERAL COURT WILL NOT FEEL BOUND BY THE DECISIONS OF THE STATE COURT.

Swift v. *Tyson*, 16 Pet. (U. S.) 1 (1842), and cases following it.
Foster Federal Practice, § 477.

The extract from Professor Beale quoted on page 12 of petitioner's brief well expounds this doctrine: "In such cases the Federal Court is declaring the law of the state, but declines to accept as binding a prior declaration of the law by the state."

AND THE QUESTION OF PRIORITY AS BETWEEN RIVAL ASSIGNEES IS SUCH A QUESTION.

In *Methven* v. *Staten Island, etc., Co.*, 66 Fed. 113 (C. C. A. 2d Circ.) (1895), there was an appeal from the Circuit Court of the United States for the Southern District of New York. The court stated that New York did not follow the doctrine of *Dearle* v. *Hall*, that in its understanding the Supreme Court of the United States did, and then it said, at page 115:—

> "Whatever view we might otherwise be disposed to take of the question, we are concluded by the authority of these judgments. *As the question is one of general jurisprudence, this court is not controlled by the decision of the highest court of the state.*" (Italics ours.)

See also *In re Leterman, Becher & Co.*, 260 Fed. 543 (C. C. A. 2d Circ.) (1919).

INQUIRY BY THE SECOND ASSIGNEE IS NOT NECESSARY.

Judge Brown's suggestion (in his dissenting opinion below) and petitioner's argument that the rule does not apply in favor of a second assignee who did not make inquiry, have failed to receive support. Inquiry has not been considered a necessary element to recovery.

In *Foster* v. *Cockerell*, 3 Cl. & Fin. 456 (1835), a House of Lords case laying down the law of England for all time unless changed by act of Parliament, *Dearle* v. *Hall*

was referred to and the rule was applied in favor of a second assignee who had made no inquiry. Indeed no mention of inquiry was made in the opinion.

In *Meux* v. *Bell*, 1 Hare, 73 (1841), this very question was elaborately discussed and it was concluded that inquiry was not a necessary element to recovery. It was pointed out that notice is itself inquiry.

Petitioner's brief does not disclose a single case in which recovery has been denied on the ground of the absence of such inquiry.

CERTIORARI HAS BEEN DENIED IN A SIMILAR CASE.

In conclusion, it may be pointed out that this court has already denied a petition for *certiorari* in a case on all fours with the present case. *In re Leterman, Becher & Co.*, 260 Fed. 543 (C. C. A. 2d Circ.) (1919), was an appeal from the District Court of the United States for the Southern District of New York involving rival assignees. As here, it was contended that the New York rule which was said not to follow *Dearle* v. *Hall* should be applied, but as here, the Federal Court applied the doctrine of *Dearle* v. *Hall* on the ground that it was the Federal rule, and that this was a question of general law as to which the Federal Courts were not bound by state decisions. Furthermore this also was a case in which the second assignee had made no inquiry. Petition was made to this court for *certiorari* and was denied under the name of *Coleman & Co.* v. *Tawas Co.*, 250 U. S. 668 (1919).

ROBERT G. DODGE,
LAURENCE CURTIS 2D,
Counsel.